

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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|--|---|---------------------|
| JOINT APPLICATION OF R.A. WILLIAMS |) | |
| CONSTRUCTION COMPANY, INC. AND |) | |
| CEDARBROOK UTILITIES, LLC FOR APPROVAL |) | CASE NO. 2008-00040 |
| OF THE TRANSFER OF WASTEWATER |) | |
| TREATMENT PLANT TO CEDARBROOK, |) | |
| UTILITIES, LLC |) | |

ORDER

R.A. Williams Construction Company, Inc., (“R.A. Williams”) and Cedarbrook Utilities, LLC (“Cedarbrook”) have jointly applied to the Commission for authority to transfer control of a sewage treatment plant and collection system from R.A. Williams to Cedarbrook.¹

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

¹ On February 1, the Applicants tendered their Application to the Commission. The Commission found the Application deficient and rejected it. On February 14, 2008, the Applicants cured the Application’s deficiencies and the Commission accepted it for filing. KRS 278.020(6) required the Commission to act upon the application within 60 days unless it was necessary for good cause shown to continue the application. On February 25, 2008, the Commission extended that statutory period for review of the Application to 120 days.

In addition to the Applicants, the Attorney General (“AG”) is a party to this proceeding. On March 20, 2008, he moved to intervene in this matter. On March 26, 2008, the Commission granted the AG’s motion and granted him leave to intervene. No other persons have sought intervention in this matter.

On February 25, 2008, the Commission established a procedural schedule in this matter. Pursuant to that schedule, Commission Staff conducted discovery upon the Applicants. Although the procedural schedule provided an opportunity for a hearing in this matter, no party requested a hearing. As KRS 278.020(6) does not require a hearing on an application for transfer of control or ownership of a utility and as a substantial record has been developed through the discovery process, we find that a hearing on the application is not required.

1. R.A. Williams, a Kentucky corporation organized pursuant to KRS Chapter 271B,² owns and operates sewage collection and treatment facilities that presently serve approximately 51 single family residential customers in the Cedarbrook Subdivision of Harrison County, Kentucky.³

2. R.A. Williams is not subject to the regulation of any metropolitan sewer district.

3. R.A. Williams' sewage collection and treatment facilities consist of a sewage treatment plant, 14,035 feet of sewer main, 2 pumps, and 54 service laterals.⁴

4. The sewage treatment plant has a maximum treatment capacity of 25,000 gallons per day and is designed to treat adequately the effluent of 60 single family residences.⁵ It is considered a Class I sewage treatment plant.⁶ It uses aerobic bacterial and aeration processes to treat effluent.⁷ It began operations in 1976.⁸

5. R.A. Williams holds a Kentucky Pollutant Discharge Elimination System ("KPDES") Permit to discharge effluent from the sewage treatment plant into an

² See <http://apps.sos.ky.gov/business/obdb/showentity.aspx?id=0055906&ct=09&cs=99997> (last visited June 12, 2008).

³ *Annual Report of R.A. Williams Construction Company to the Kentucky Public Service Commission for the Year Ending December 31, 2007* at 12. In their Application, the Applicants state that the sewage treatment plant serves approximately 54 single family residences. See Application at ¶ 2.

⁴ *Annual Report for Year Ending December 31, 2007* at 12.

⁵ *Id.* at 11.

⁶ See 401 KAR 5:010, Section 8. A Class I treatment plant is a treatment plant with a design capacity of less than or equal to 50,000 gallons per day.

⁷ *Annual Report for Year Ending December 31, 2007* at 11.

⁸ *Id.* at 1.

unnamed stream that eventually flows into the Licking River. This permit expires March 31, 2013.⁹

6. R.A. Williams reports, as of December 31, 2007, utility plant in service of \$102,211 and accumulated depreciation of \$10,587, resulting in net utility plant of \$91,624.¹⁰

7. R.A. Williams reports, as of December 31, 2007, a balance of \$91,255 in Account No. 271, "Contributions in Aid of Construction."

8. R.A. Williams reports that, as of December 31, 2007, the subdivision developer had recovered 100 percent of the sewer utility plant in service through the sale of lots.¹¹

9. By reducing net utility plant of \$91,624 by the net contributions in aid of construction of \$91,255, R.A. Williams has a net unrecovered value of utility plant of \$369.

10. R.A. Williams reported outstanding liabilities of \$178,372 as of December 31, 2007. These liabilities are comprised of notes payable to associated companies of \$12,425 and accounts payable to associated companies of \$165,947.¹²

11. R.A. Williams reports utility operating revenues and expenses of \$13,410 and \$20,437, respectively, for the calendar year ending December 31, 2007.¹³

⁹ Applicants' Response to Commission Staff's First Data Request, Item 1, Exhibit A.

¹⁰ *Annual Report for Year Ending December 31, 2007* at 2.

¹¹ *Id.* at 3 and 11.

¹² *Id.* at 3.

¹³ *Id.* at 8.

12. R.A. Williams reported a net utility operating income and a net income of (\$6,398) and (\$7,212), respectively, for the calendar year ending December 31, 2007.¹⁴

13. On January 25, 2008, R.A. Williams and Cedarbrook entered into an “Asset Purchase Agreement” that provides, inter alia, that:

a. R.A. Williams will convey to Cedarbrook its wastewater treatment plant and associated sanitary sewers, pumping stations, force mains, easements and land upon which the wastewater treatment plant is located for one dollar;

b. R.A. Williams will provide to Cedarbrook copies of all records relating to the ownership, operation, maintenance and design of the wastewater system including, but not limited to, sewer maps, construction plans, and drainage plans that may exist;

c. R.A. Williams will transfer to Cedarbrook its KPDES discharge permit and all other permits, licenses, and authorizations that it currently possesses;

d. Cedarbrook will assume all liabilities arising out of the operation of the wastewater system that exists as of the date of the closing, with the exception of any liability arising out of or relating to Case No. DOW 0251;

e. R.A. Williams will deliver \$22,000 to Cedarbrook at the close of the transfer;

f. R.A. Williams will pay \$2,500 for legal fees incurred to prepare, file, and represent the Applicants in proceedings to obtain Commission approval of the proposed transfer of ownership; and

¹⁴ Id.

g. R.A. Williams will pay \$5,500 to Covered Bridge Utilities, Inc. for the cost of managing the wastewater facilities from February 1, 2007 until the transfer is complete.

14. R.A. Williams has entered an Agreed Order with the Kentucky Environmental and Public Protection Cabinet (“EPPC”) in which it has agreed to transfer its sewage treatment and collection facilities to a third party of whom the Commission approves.¹⁵ In lieu of the proposed transfer, EPPC agreed to waive all but \$7,500 of outstanding penalties and fines for R.A. Williams’ failure to complete required improvements to resolve its existing inflow and infiltration conditions that were causing improper and illegal discharges of effluent.

15. Cedarbrook is a Kentucky limited liability company that was formed on January 9, 2008.¹⁶

16. Cedarbrook’s sole members are Martin Cogan and Larry Smither.¹⁷

17. Mr. Cogan has a Master’s Degree in Environmental Engineering from the University of Louisville. He has participated in the operation of wastewater treatment plants over the last 20 years.¹⁸

18. Mr. Smither is currently certified by the Environmental and Public Protection Cabinet as a Class II Wastewater Treatment Plant Operator. He has over 30 years of experience operating and managing package wastewater treatment plants.¹⁹

¹⁵ In Re R.A. Williams Construction Company, Inc., No. DOW-33217-156 (Ky. EPPC Mar. 14, 2008).

¹⁶ Application at Exhibit D.

¹⁷ Applicants’ Response to Commission Staff’s First Data Request, Item 8.

¹⁸ Application at ¶ 6.

¹⁹ Id.

19. Mr. Cogan and Mr. Smither currently own or previously owned several wastewater treatment facilities located in Kentucky.²⁰

20. Since July 1, 2005, Covered Bridge Utilities, LLC, has operated R.A. Williams' sewage treatment system.²¹ Mr. Smither, a member of Covered Bridge Utilities, LLC, has been the person primarily responsible for the provision of these services to R.A. Williams.

21. Cedarbrook has obtained an irrevocable letter of credit from the Old National Bank of Evansville, Indiana in the amount of \$20,000. The Commission is named as beneficiary of this instrument.²²

22. In July 2000, R.A. Williams retained Shield Environmental Associates, Inc. ("Shield") to perform an inflow and infiltration study to identify potential sources of hydraulic surges. In the report of its study, which was issued in December 2000, Shield identified significant sources of inflow and infiltration and found that a significant reduction of inflow and infiltration would result if these sources were addressed.²³

23. R.A. Williams performed the repairs to eliminate the sources of inflow and infiltration that Shield had identified.²⁴

²⁰ Applicants' Response to Commission Staff's First Data Request, Item 8.

²¹ Application at ¶ 6.

²² This instrument fails to identify the condition under which the Commission is entitled to payment. The only event expressly identified is the default of Cedarbrook Utilities, LLC "in its payment obligation to Kentucky Public Service Commission for electric service rendered at 1706 Bardstown Road, Louisville, KY 40205."

²³ Kevin M. Regan and Terry M. Regan, *Inflow and Infiltration Study* (Shield Environmental Associates, Inc. Dec. 2000) at 5-6.

²⁴ Nicole R. Galavotti and Debbie Howard, *Corrective Action Plan Phase II I/I Study: Cedarbrook Subdivision* (Shield Environmental Associates, Inc. July 2004) at 1.

24. In 2004, R.A. Williams retained Shield to perform a second study to quantify and locate storm water inflow and infiltration into R.A. Williams' sewer collection mains. In this study, Shield concluded that the system "suffers from a number of physical issues that have resulted in the inflow and infiltration of storm water during sizable rain events."²⁵ It, however, did not identify any corrective actions for the inflow and infiltration problems, but summarily concluded that R.A. Williams had determined that the required repairs were not financially feasible and intended to cease operating the system.²⁶

25. The Applicants assert that inflow and infiltration problems result from poor connections to the system's vitrified clay mains and that a systematic long-term reconstruction of the collection system is required.²⁷

26. Between March 2006 and February 2007, R.A. Williams solicited bids for the necessary repairs to correct the sewage treatment and collection system's inflow and infiltration problems. These estimates ranged between \$140,464 and \$175,166.²⁸

27. R.A. Williams has not undertaken any reconstruction or replacement of the collection mains.

²⁵ Id. at 8.

²⁶ Id.

²⁷ Applicants' Response to Commission Staff's First Data Request, Item 11(b).

²⁸ Id. at Item 11(c). These bids are listed below:

| Date of Bid | Vendor | Amount |
|-------------------|------------------------------------|-----------|
| February 1, 2007 | Murphy's Excavating | \$148,650 |
| January 18, 2007 | Campbell Plumbing, LLC | \$175,166 |
| September 7, 2006 | Martin's Pipeline Inspection, Inc. | \$154,797 |
| February 5, 2007 | M&M Electric, Inc. | \$168,245 |
| March 21, 2006 | Covered Bridge Utilities, Inc. | \$140,464 |

28. Cedarbrook has not developed a plan for financing the required corrective measures.

29. Cedarbrook has not stated any intention or plan to contribute capital into the sewage treatment and collection system upon its acquisition for major infrastructure improvements.

30. The members of Cedarbrook have not stated any intention or plan to make capital contributions to Cedarbrook to assist the entity's operations or enable it to make major infrastructure improvements.

31. Cedarbrook states its intention to deposit \$15,000 of the \$22,000 payment that R.A. Williams will make at the closing of the proposed transfer for operation and maintenance expenses.²⁹ This stated intention conflicts with earlier Cedarbrook statements regarding the use of the \$22,000.³⁰

32. To continue existing operations and finance any capital improvements, Cedarbrook presently intends to rely upon R.A. Williams' existing rate and to pursue the proposed rate adjustment³¹ that is currently pending before the Commission.³² It has

²⁹ Applicants' Supplemental Response to Commission Staff's Second Data Request, Item 3.

³⁰ Cedarbrook has stated that the proceeds of the \$22,000 will be used to pay "overdue management fees, to pay attorney fees and accountant fees associated with the purchase of the Cedarbrook WWTP, to pay for repairs to equipment at the plant, to maintain cash on hand for unanticipated expenses, to pay for expenses associated with the issuance of the Letter of Credit and to pay other utility expenses." Applicants' Supplemental Response to Commission Staff's First Data Request, Item 10. Cedarbrook subsequently stated that \$9,500 of the proceeds would be used for overdue management fees, \$8,038.32 for attorney fees, \$500 for the issuance of a Letter of Credit, and \$4,000 for the installation of a chlorine disinfection system. Applicants' Response to Commission Staff's Second Data Request, Item 4. These expenses total \$21,538.32.

³¹ Case No. 2008-00042, Application of the Cedarbrook Treatment Plant for an Adjustment of Rates Pursuant to Alternative Rate Filing Procedure for Small Utilities (filed Feb. 7, 2008).

³² Cedarbrook's Supplemental Response to Staff's Second Data Request, Item 3.

suggested that capital improvements may also be financed with loans or a customer surcharge.

33. As the proposed transfer is currently structured, neither Cedarbrook nor its members will invest any monies to acquire the sewage treatment and collection facilities or improve its current condition.

34. Cedarbrook has not presented any balance sheet or statement of its present assets and liabilities.

35. The Agreed Order with DOW, while placing R.A. Williams under an obligation to transfer, does not in any way compromise the Commission's statutory obligation to require a showing that the transfer meets all requirements according to law.

Based upon these findings, the Commission makes the following conclusions of law:

1. R.A. Williams is a utility and is subject to Commission jurisdiction.³³
2. Cedarbrook is a "person" for purposes of KRS Chapter 278.³⁴
3. KRS 278.020(5) provides that "[n]o person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission . . . without prior approval by the commission." As Cedarbrook is a person and is acquiring ownership of the Cedarbrook Subdivision sewage treatment facilities, this statute is applicable to and requires Commission approval of the proposed transfer.
4. KRS 278.020(6) provides that "[n]o individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity

³³ KRS 278.010(3)(f); KRS 278.040.

³⁴ KRS 278.010(2).

(an 'acquirer'), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission." As Cedarbrook is acquiring control of R.A. Williams' utility operations through the acquisition of the facilities that R.A. Williams uses to provide utility service, this statute is applicable to and requires Commission approval of the proposed transfer.

5. Cedarbrook possesses the technical and managerial abilities to provide reasonable service to R. A. Williams' present customers.

6. Cedarbrook has failed to demonstrate that it possesses the financial ability to provide reasonable utility service to R.A. Williams' present customers. The record does not contain adequate evidence of Cedarbrook's current financial assets and liabilities, nor does it contain evidence to suggest that Cedarbrook has sufficient assets or a plan for obtaining sufficient funds to perform the necessary capital improvements to comply with state environmental laws.

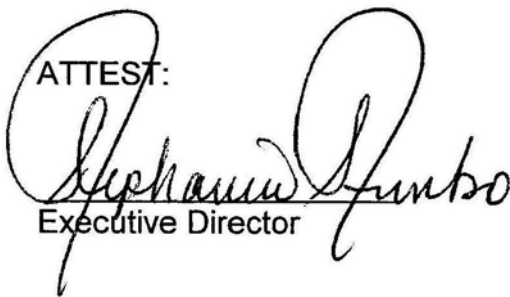
IT IS THEREFORE ORDERED that the proposed transfer of the sewage treatment and collection facilities that serve the Cedarbrook Subdivision from R.A. Williams to Cedarbrook is denied without prejudice.³⁵

³⁵ We place the Applicants on notice that should they again apply for approval of the proposed transfer, we will expect them to provide adequate evidence of Cedarbrook's financial ability to provide reasonable utility service.

Done at Frankfort, Kentucky, this 13th day of June, 2008.

By the Commission

ATTEST:


Executive Director